United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL

76-7067

To be argued by
WILLIAM HART

IN THE

United States Court of Appeals

For the Second Circuit

UNITED STATES FIDELITY & GUARANTY COMPANY,
Plaintiff-Appellant,

against

ROYAL NATIONAL BANK OF NEW YORK and
MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of New York
(C.D. 68 Civ. 2054 [H.F.W.])

BRIEF OF DEFENDANT-APPELLEE ROYAL NATIONAL BANK OF NEW YORK

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Issues Presented for Review

On the basis of a reading of plaintiff's brief, we submit that the four "Questions Presented for Review" by plaintiff which relate to defendant Royal National Bank of New York (Royal), to wit, Questions numbered 1, 2, 3 and 5, should properly be stated as follows:

1. Was the district court clearly in error in finding as a matter of fact that the circumstances surrounding the sale of the Treasury Notes were not sufficiently suspicious to cause defendant Royal concern and that defendant Royal acted in good faith and observed reasonable commercial standards within the meaning of Section 8-318 of the Uniform Commercial Code (JA 16)?*

2. Was the district court clearly in error in finding as a matter of fact that defendant Royal did not have actual knowledge and did not disregard suspicious circumstances and thus was not guilty of bad faith within the meaning of the New York law as described in *Gutekunst* v. *Continental Insurance Company*, 486 F.2d 194 (2 Cir. 1973) (JA 16)?

3. Was the district court clearly in error in finding as a matter of fact that the circumstances surrounding the sale of the Treasury Notes were not suspicious and that defendant Royal acted in good faith in dealing with its customer (JA 16)?

* * *

5. Was the district court clearly in error in finding as a matter of fact, on the issue of equitable estoppel, that the loss was caused by the failure of plaintiff's assignor properly to maintain an inventory and by its further failure promptly to report the loss, so that as between plaintiff and defendants, plaintiff should bear the loss (JA 17-18)?

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* References to parts of the record reproduced in the joint appendix will be designated by the letters "JA" followed by the page in the joint appendix.

Statement of the Case

The facts relating to defendant Royal's sale to defendant Merrill Lynch, Pierce, Fenner & Smith, Inc. (Merrill Lynch) of certain Treasury Notes for the account of Frank Mazzochi, Jr., and the disposition of the proceeds thereof, are established largely by documentary evidence and, for the most part, are not in dispute. The district court considered all of the evidence and found as a matter of fact that the circumstances surrounding these sales were not suspicious. At pages 17-18 of its brief, plaintiff lists 8 specific findings of fact which it contends are "clearly erroneous and directly contradicted by the record", involving (a) the relationship between defendant Royal and Frank Mazzochi, Jr. prior to the transactions in question, (b) the investigations conducted by defendant Royal and the consequences thereof, and (c) the conduct of W. E. Hutton & Co. (Hutton), plaintiff's assignor, following its discovery that certain Treasury Notes appeared to be missing, including its decision not to report the loss to the proper authorities because of the bad publicity which might result.

We believe, however, that plaintiff's brief does not fairly and completely present the evidence relating to these issues, without which this Court would not be in a position properly to evaluate the district court's findings of fact. Accordingly, we shall set forth below the facts relating to these issues, avoiding, wherever possible, an unnecessary repetition of those facts which are accurately set forth in plaintiff's brief.

The Mutual Credit Union

At the time of the sales of the Treasury Notes in August and September, 1966, Frank Mazzochi, Jr. was President of the Mutual Credit Union (Mutual), a long established customer of defendant Royal which had been in existence for over fifty years (JA 1095). Mutual's account at defendant Royal's branch at 326 East 149th Street, Bronx, New York, was opened in 1951 by William Goldfine, who subsequently became Chairman of the Board of Directors of defendant Royal (JA 1144), and the account continued uninterrupted from that time on (JA 1136, 178).

Mutual, which was a frequent borrower from defendant Royal (JA 1137, 1157, 861), was made up of some of defendant Royal's more well-regarded customers, including individuals who were engaged in the real estate business in the area (JA 177, 196, 1029). The offices of Mutual were located on the Grand Concourse in the Bronx, having moved there from East 149th Street (JA 1029). Some of the members of Mutual who were known to defendant Royal included the following:

Arnold Dutchen, who had been known to defendant Royal for many years and was in the insurance and real estate businesses (JA 1153-54, 1079-80, 1095-96); he and his family had been in the 149th Street area for many, many years, were always highly regarded and were reputed to be fairly well off (JA 1046);

Jacob Haimowitz, who was a lawyer with an office on East 149th Street (JA 1156-57);

Saul Geltman, who was in the real estate business with an office on East 149th Street (JA 1157);

Solomon Levine, who was in the real estate business and banked with defendant Royal at the East 149th Street branch (JA 1161-62);

David Fassberg, who was in the real estate business with an office on Popham Avenue in the Bronx (JA 1162);

Manny Lubash, who had been in the area for thirty years or so, was very well regarded and was looked upon as a man of some substance (JA 1046);

Ed Gotthelf, who, with his father, had been in business in the area for many years and was considered responsible and reasonably wealthy (JA 1046-47).

Mazzochi's Introduction to the Bank

Frank Mazzochi, Jr. was introduced to defendant Royal in early 1965 when he was brought into the bank by Mr. Dutchen, Mr. Haimowitz and Mr. Geltman and introduced by them as a new officer of Mutual who would be taking over the presidency (JA 1131-33). On February 10, 1965, Mutual filed with defendant Royal a signature card (JA 666) naming Frank Mazzochi, Jr. as an authorized signatory on Mutual's account, together with Messrs. Levine, Haimowitz and Fassberg and Mr. Lawrence Rothberg who was a Certified Public Accountant (JA 1041). On April 27, 1965, Mutual filed a Certificate to Corporate Banking Resolutions (JA 672-73), identifying Frank Mazzochi, Jr. as President of Mutual, Mr. Haimowitz as Vice-President,

Mr. Levine as Secretary, Mr. Rothberg as Treasurer and Mr. Fassberg as an additional signatory.

On January 19, 1966, Mutual filed a new signature card and a new Certificate (JA 668, 674-75), identifying Frank Mazzochi, Jr. as President, Mr. Dutchen as Vice-President, Mr. Levine as Secretary, Mr. Rothberg as Treasurer and Mr. Fassberg as an additional signatory. That Frank Mazzochi, Jr. continued to hold the office of President of Mutual at least through all of 1966 and into 1967 is established by a signature card of Mutual dated March 29, 1967 (JA 670) which identified him as President, Mr. Dutchen as Vice-President, Mr. Rothberg as Treasurer and Mr. D'Agostino as Secretary.

As might be expected, the members of Mutual referred to above were considered by defendant Royal to have been references for Mr. Mazzochi and the fact that they continued their association with Mutual after he became President was considered to be quite a reference (JA 1047).

After February 10, 1965, Mr. Mazzochi came into the bank frequently, making deposits about twice a week (JA 1147-48). From time to time, defendant Royal's officers had conversations about Mr. Mazzochi with members of Mutual whom they knew well, and those members said that Mr. Mazzochi was bringing fresh money into Mutual and was doing a fine job for them (JA 1155-56, 1163, 1193-94, 1016, 1098-99). In early 1965, Mutual was required to present Mr. Mazzochi and its books to the New York State Banking Department to obtain that Department's approval of Mr. Mazzochi as an officer of Mutual; and Mr. Mazzochi was approved by the New York State Banking Department

without any problem (JA 1156, 1193-94). Mr. Mazzochi presented a nice image and developed a nice relationship with defendant Royal (JA 1172). He opened a few other business accounts with the bank (JA 312, 716) and ran them in a very favorable manner, never causing the bank any problems (JA 1171-72, 1192). He appeared to be in his late 20's or early 30's (JA 1191, 1035), and was well dressed, polite and soft spoken (JA 1191-92). He was on a first name basis with at least some of the officers of defendant Royal (JA 940) and was considered to be a very reputable, solid citizen (JA 1171).

The Sales of the Notes

On August 4, 5 and 9 and September 12, 1966 (JA 44), defendant Royal, acting as agent for Frank Mazzochi, Jr., sold to defendant Merrill Lynch, for the account of Frank Mazzochi, Jr., a total of twenty-seven Treasury Notes with an aggregate face value of $212,000.00, the proceeds of which were deposited into Mr. Mazzochi's checking account and withdrawn by him in cash over a period of several weeks (JA 684-86). There was no evidence offered by the plaintiff to indicate that any of these Treasury Notes had been stolen from Hutton or from anyone else, and, as will be discussed below, defendant Royal believes that plaintiff failed to establish by competent evidence that Hutton either owned or had the right to possession of the Treasury Notes in question.

The clerical details of each of the sales was handled by Mr. Rudolph Santoro, who at the time was acting head of defendant Royal's loan department at the 149th Street branch (JA 74) and whose responsibilities were clerical in

nature, involving the processing of documents and the typing of reports, but not the making of decisions or judgments (JA 99-100, 129-30). Prior to the first sale, Mr. Santoro had seen Mr. Mazzochi in the bank but did not know him by name and had had no banking transactions with him (JA 76).

With respect to each sale, Mr. Santoro received from Mr. Mazzochi a letter authorizing defendant Royal to sell the Notes (JA 676-79), and after receiving verbal authorization from an officer of defendant Royal to make each sale, routinely called the Federal Reserve Bank to inquire if the Notes had been reported missing or stolen, and after receiving a negative response, called defendant Merrill Lynch and placed the order for the sale (JA 151-53, 166-68, 182-83). After each sale had been made, Mr. Santoro prepared an internal credit memorandum, or confirmation slip, which the officer signed to evidence his approval of the transaction (JA 642-46). Mr. Santoro also prepared a delivery ticket which accompanied each delivery of the Treasury Notes to defendant Merrill Lynch and which contained the statement, conspicuously placed, "FOR THE ACCOUNT OF: Frank Mazzochi, Jr." (JA 638-41).

The credit officer of defendant Royal who approved the first three sales was Mr. Robert Kayner. Mr. Kayner had met Mr. Mazzochi in the bank about a year prior to August 1966, and he knew Mr. Mazzochi was an officer of Mutual and also had several business accounts in the bank (JA 312-15, 825-26, 829). The Treasury Notes were regular on their face (JA 186), and Mr. Kayner testified that at the time he approved the sales, he was satisfied that Mr. Mazzochi had the right to sell them (JA 317-18).

The credit officer of defendant Royal who approved the last sale on September 12, 1966 was Mr. Edward I. McGraw (JA 147, 155), Mr. Kayner having left the 149th Street branch of defendant Royal in early September 1966 to become manager of the bank's branch in Queens (JA 353). In September 1966, Mr. McGraw had known Mr. Mazzochi for almost two years and was on a first name basis with him (JA 940). At about the time he approved the sale, Mr. McGraw learned of Mr. Mazzochi's large cash withdrawals and discussed the transactions with him, asking him if the Notes were his and being assured that they were (JA 960-61).

The Investigations by Messrs. Walter and Stolz

When the last sale was made on September 12, 1966, more than a month had elapsed since the sales on August 4, 5 and 9, 1966, and defendant Royal had heard nothing which would indicate that there was any question about Mr. Mazzochi's right to have sold them. Moreover, it is not disputed that during this entire period, and in fact until November 1966 when Hutton finally reported the loss of certain Treasury Notes to the proper authorities, there was no way in which defendant Royal or anyone else could have determined that any of the Treasury Notes presented by Mr. Mazzochi were claimed by Hutton to have been lost or stolen (JA 41-42, 413-19, 450).

Nevertheless, when the proceeds of the last sale were received by defendant Royal from defendant Merrill Lynch, Mr. McGraw ordered that the money be held in suspense and not be credited to Mr. Mazzochi's account, feeling that the bank would be protected by holding the money until it

could be determined whether anything was wrong (JA 989-90). He spoke by telephone with Mr. Irving Stolz, who was defendant Royal's attorney, and he sent a memorandum to Mr. Peter Walter, the Cashier of defendant Royal whose office was at the bank's main branch on East 48th Street in Manhattan, calling to their attention the large cash withdrawals and asking them how to proceed (JA 974-75, 992, 693).

Mr. Stolz, who had been general counsel to defendant Royal since 1952 (JA 791), testified that his recollection of the events of September 1966 was not clear but that he could reconstruct what happened by reference to a letter dated September 21, 1966 which he had received from Mr. McGraw (JA 690) and at the foot of which he had placed and initialed his own contemporaneous memorandum (JA 795, 817). Apparently, Mr. McGraw spoke with Mr. Stolz by telephone on Monday, September 19, 1966, and Mr. Stolz suggested that Mr. McGraw obtain an affidavit from Mr. Mazzochi certifying that he was the owner of the Treasury Notes which defendant Royal had sold for him (JA 804). Mr. Stolz believed that Mr. Mazzochi's possession of the Notes would be proof enough, but he suggested the affidavit in order to be cautious (JA 804). On September 20, 1966, Mr. Mazzochi signed such an affidavit at the bank's offices in the presence of Mr. McGraw and a notary public, certifying that he was the rightful owner of the Treasury Notes which defendant Royal had sold for him in August and September 1966 and which he identified in the affidavit by certificate numbers (JA 982, 691-92). Mr. McGraw sent the affidavit to Mr. Stolz with his September 21, 1966 letter.

As appears from Mr. Stolz's memorandum at the foot of the September 21, 1966 letter, upon receipt of the affidavit, probably on September 22 or 23, 1966, he called Mr. Wallace Nathan, who was counsel to the Deputy Comptroller of the Currency, and Mr. Walter called the F.B.I. and the Secret Service. Mr. Walter's testimony confirmed that he placed those telephone calls, that he received no affirmative responses to his inquiries as to whether any of the Notes which Mr. Mazzochi had presented for sale had been reported stolen (JA 1109-18) and that he reported the results of his investigation to Mr. Stolz by telephone (JA 1122-25, 801-02).

Mr. Stolz made a similar inquiry of Mr. Nathan who took several days to check and then informed Mr. Stolz that he had found no record of those Notes having been reported stolen or missing and that he did not see that defendant Royal had any choice but to credit the proceeds of the sale to Mr. Mazzochi's account (JA 808-10). As mentioned above, plaintiff concedes that Hutton made no report of its alleged loss of Treasury Notes to the proper authorities until November 1966, well over a month after these investigations were conducted (JA 413-19, 41-42).

During the period of a little over two weeks that the proceeds were held in suspense, *i.e.*, from approximately September 13 to September 29, 1966, Mr. Mazzochi came into the bank every day to find out what was happening with his money and retained an attorney, Mr. Leonard Yoswein, to represent him in connection with obtaining the release of the funds (JA 199, 204). Mr. Stolz spoke with Mr. Yoswein on three different occasions, during which Mr. Yoswein told Mr. Stolz that defendant Royal had no legal right to with-

hold his client's money and Mr. Stolz told Mr. Yoswein that he had instructed the bank to withhold the money until they had checked the Treasury Notes through various government agencies (JA 810-12).

The investigation was apparently concluded on September 29, 1966 because on that day the sum of $71,698.70 was released from suspense and credited to Mr. Mazzochi's personal checking account (JA 991, 993, 995-96). The statements of Mr. Mazzochi's account for the periods ending September 30, 1966 and October 31, 1966 reflect that on September 30, 1966, which was a Friday, Mr. Mazzochi withdrew $10,000 from his account, and on October 3, 1966, the following Monday, withdrew an additional $61,000 (JA 685-86).

Hutton's Discovery of Missing Certificates

It is plaintiff's contention that most of the Treasury Notes sold by defendant Royal for Mr. Mazzochi had been stolen from Hutton. The only evidence which plaintiff offered in support of this contention was a typed list of certificate numbers (JA 636) bearing the date September 27, 1966 and containing twenty-six certificate numbers, twenty-three of which were among the twenty-seven Treasury Notes which defendant Royal sold for Mr. Mazzochi. Mr. Thomas Rockafeller, who had been assistant manager of Hutton's operations division in 1966 (JA 363), admitted that the list had been prepared in Hutton's office in Cincinnati, Ohio, on the basis of a teletyped message sent to him there from Hutton's New York office for purposes of preparing a claim to be submitted to Hutton's insurance company, the plaintiff in this action (JA 425). Mr.

Rockafeller identified specifically the records and documents prepared and maintained by Hutton which would have established Hutton's alleged loss and admitted that under Hutton's policy for the retention of records, these records and documents would have been available until at least 1974 (JA 391). However, not a single such original record or document was ever produced, either before or during the trial.

Mr. Rockafeller testified that he had been on vacation for most of the month of August 1966 and that when he returned from vacation, he was informed that during a routine audit, an apparent shortage of United States Treasury Notes had been discovered (JA 393-94) and a search was in progress to determine if the unaccounted for securities had been misfiled, misplaced or perhaps even thrown out with the trash (JA 366, 394).

After Mr. Rockafeller's return, Hutton began trying to identify the actual certificate numbers of the missing certificates (JA 395). Mr. Rockafeller admitted that Hutton had never before experienced a loss of securities of this sort (JA 389), had no manual on how to proceed (JA 395), and was "rather unsophisticated in this type of thing." (JA 408). He stated that the only record of the certificate numbers of the Treasury Notes that should have been in Hutton's vault was a handwritten list of certificate numbers prepared in May 1966 by the clerk who clipped coupons from the Treasury Notes in the vault (JA 390-393). Mr. Rockafeller did not know where that list was (JA 390).

He testified that a group of individuals in Hutton's cashier's department began with that list of certificate num-

bers and reviewed Hutton's records of all United States Treasury Note transactions from May 15, 1966 to September 1966 to determine which certificates were received and which certificates were delivered in order to determine which certificates should have been in the vault (JA 395-96). He said that activity in government securities was minimal in those days and this process was not as laborious as it might seem, but he did not know where the records were which those individuals had reviewed (JA 396). Those records have never been produced.

Mr. Rockafeller admitted that there were no safeguards built into Hutton's method of investigation to avoid the type of error which could have occurred if one of the clerks reviewing the records overlooked a proper transaction which would have accounted for one of the apparently missing certificates (JA 397). When shown a copy of a letter dated August 10, 1967 from the Bureau of the Public Debt to the F.B.I. (JA 688), Mr. Rockafeller conceded that at least one such error had actually occurred and that certificate number 31606 should not have been included on the list (JA 405-06).

Mr. Rockafeller testified that he first learned which certificate numbers were believed to be missing on September 27, 1966 when he received the teletyped list in Cincinnati (JA 384), but plaintiff admitted in its answer to Interrogatory No. 16 of defendant Merrill Lynch that James Barbi, a partner of Hutton, learned they were missing on September 24, 1966 (JA 40-41). Hutton reported the loss to its insurance company promptly (JA 425). However, even though Hutton knew that these were bearer securities which pass by delivery and could come

into the illegal possession of another person (JA 407-09), Hutton did not report the loss to the police or to anyone else except its insurance company until November 1966, the partners of the firm having met and decided not to report the matter to the police because of the bad publicity which might result (JA 412-19). It was the plaintiff's own claims examiner, Mr. James E. Bills, who finally persuaded Hutton, on November 2, 1966, that the claimed loss should be reported to the F.B.I. and the police (JA 417-19).

Mr. Rockafeller admitted that if any of those certificates had been presented to a third party for any purpose and such third party wanted to make inquiry to determine whether or not they had been reported missing or stolen, any such inquiry would have been fruitless as long as Hutton did not report the certificates as missing or stolen (JA 450, 475-76).

ARGUMENT

The instant appeal does not raise any serious questions of law. The thrust of plaintiff's position is that it disagrees with the district court's factual findings that defendant Royal acted in good faith and did not ignore suspicious circumstances and is asking this Court to reverse the district court on the ground that such findings were "clearly erroneous".

The position of defendant Royal is as follows:

1. The district court's findings of fact are amply supported by the record and can by no stretch of the imagination be said to be "clearly erroneous"; and

2. Defendant Royal is not liable to the plaintiff for conversion of the Treasury Notes in question because

a. defendant Royal is relieved of liability for conversion by the provisions of Section 8-318 of the Uniform Commercial Code, entitled "No Conversion by Good Faith Delivery"; and

b. plaintiff is estopped from asserting a claim herein against defendant Royal because of Hutton's failure and deliberate refusal to report the loss of the Treasury Notes to the proper authorities promptly upon its discovery.

POINT I

The district court's findings of fact were not "clearly erroneous."

There is no dispute regarding the principles governing this Court's evaluation of plaintiff's challenge to the district court's findings. In applying the "clearly erroneous" standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*. The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123, 23 L.Ed.2d 129, 148, 89 S.Ct. 1562 (1969). "Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them." *United*

States v. *Yellow Cab Co.*, 338 U.S. 338, 341, 94 L.Ed. 150, 153, 70 S.Ct. 177 (1949). "It is not enough that [the appellate court] might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent." *United States* v. *National Association of Real Estate Boards*, 339 U.S. 485, 495, 94 L.Ed. 1007, 1016, 70 S.Ct. 711 (1950). This Court must affirm the district court unless it is left with the definite and firm conviction that a mistake has been committed. *United States* v. *Second National Bank of North Miami*, 520 F.2d 535, 547 (5 Cir. 1974).

That the district court's findings are not "clearly erroneous" and are supported by more than ample evidence is, we submit, readily established by reference to the record. Plaintiff sets forth and discusses at pages 17-26 of its brief the eight specific findings of fact which it contends are "clearly erroneous and directly contradicted by the record." We will discuss *seriatim* the seven challenged findings which relate to defendant Royal in the order in which they are set forth in plaintiff's brief. For the convenience of the Court, we shall begin each item with a brief descriptive heading, maintaining, however, the letter designation employed by plaintiff.

a. Hutton's System

The district court's finding that Hutton's "system was, to say the least, casual and careless and hardly a secure system" is based upon and supported by Mr. Rockafeller's testimony regarding the time-consuming and imprecise method which Hutton was required to employ to identify the missing certificate numbers, as is fully described, *supra*,

at pp. 12-15. This system, coupled with what the district court described as Hutton's "slothful actions after the securities were found to be missing" (JA 17), resulted in Hutton's taking more than a month simply to identify the 26 certificate numbers of the Treasury Notes for which it is making claim in this action.

b. Mr. Mazzochi's Recommendations

In beginning its discussion of this point at page 19 of its brief, plaintiff seems to imply that the district court found that Mr. Mazzochi was convicted of a crime relating to the Treasury Notes here in issue. No such finding was made, and no evidence to support such a contention was offered. The Pre-Trial Order (JA 45) states that in 1968 Mr. Mazzochi was convicted in state court of criminally concealing and withholding stolen and wrongfully acquired property. However, plaintiff offered no evidence to shed any light on the underlying basis of Mr. Mazzochi's conviction, and there is nothing in the record to indicate that it was in any way connected with the Treasury Notes in issue in this case.

With respect to Mr. Mazzochi's recommendations, it is clear that the district court relied both on Mutual itself and on the quality of Mutual's individual members, as well as on the State Banking Department's approval of Mr. Mazzochi as President of Mutual (see discussion, *supra*, pp. 4-7). Accordingly, the conclusion of the district court that "Mazzochi thus came to the bank upon good recommendation" (JA 10) is plainly supported by the record.

c. Mr. Santoro's Calls to the Federal Reserve Bank

The district court heard the testimony of Mr. Santoro (JA 151-53, 166-68, 182-83) and held as a matter of fact that he "routinely called the Federal Reserve Bank in New York to inquire whether the note had been reported missing or stolen" (JA 11). Mr. Weis, who in 1966 was in personnel relations and had nothing to do with the government bond division or with securities (JA 295, 297, 301) did not deny that Mr. Santoro had made the telephone calls to which he testified but merely stated, as the district court observed (JA 12), that as far as he knew, the Federal Reserve Bank maintained no official list of missing or stolen securities. Mr. Weis testified further, however, that in 1966 banks and stock brokers reported missing or stolen securities to the Federal Reserve Bank, although he did not know whether it was a common practice (JA 296-97).

The district court accepted Mr. Santoro's testimony, but, we submit, even if it had not, it would have made no difference in the outcome of this case since, as will be discussed below, the district court also found that inquiry by defendant Royal "would have proven fruitless because Hutton did not report the loss until long after the transactions had been completed and the funds withdrawn." (JA 17).

d. The Release of the Proceeds of the Last Sale

In its discussion of this point at pages 20-22 of its brief, plaintiff challenges the district court's implicit finding that defendant Royal acted properly in releasing from the suspense account the proceeds of the last sale. In making its argument, plaintiff continues to contend that the circum-

stances surrounding the last sale were suspicious. However, the district court found as a matter of fact that those circumstances were not suspicious (JA 16), and the district court's finding is amply supported by the record.

As was discussed in greater detail above, Mr. McGraw, who approved the last sale for defendant Royal, had known Mr. Mazzochi for almost two years and was on a first name basis with him (JA 13, 940). The Notes were regular on their face (JA 186), and more than a month had elapsed since the first three sales, with nothing coming to light to indicate that there might have been anything wrong (JA 13). Mr. McGraw testified not that he found the sales of the Notes suspicious but rather that his attention was attracted by the large cash withdrawals (JA 960-61) which he was concerned might have been in violation of Federal Reserve Bank regulations (JA 968-69). He therefore referred the matter to defendant Royal's main office and solicited the advice of defendant Royal's attorney (JA 974-75). At the time he accepted Mr. Mazzochi's affidavit, he was not concerned about whether Mr. Mazzochi was the owner of the Notes but merely wanted to have something in the file to back up the large cash withdrawals (JA 986). Mr. Mazzochi's affidavit was dated September 20, 1966 (JA 691-92). On September 21, 1966, defendant Royal wrote to the Federal Reserve Bank to report Mr. Mazzochi's large cash withdrawals (JA 647-51). These facts were considered by the district court (JA 14-15).

Plaintiff concludes its discussion of this point with the statement at page 22 of its brief that defendant Royal was "required to do far more than to obtain an affidavit from Mr. Mazzochi . . . ." Without conceding that in the cir-

cumstances of these transactions defendant Royal had any obligation to make any inquiry, we call to the Court's attention that plaintiff has totally omitted any reference to the very extensive investigations conducted by Mr. Stolz and Mr. Walter (JA 13-14 and *supra*, pp. 9-12). These investigations proved to be fruitless, as the district court found, because of Hutton's business decision not to report the loss (JA 7-9, 17).

e. The Testimony of Mr. Sixt

The district court heard the testimony of Mr. Sixt, the expert witness called by plaintiff, and concluded that Mr. Sixt appeared to be biased and that his testimony should therefore be largely discounted (JA 16). Plaintiff has set forth no reasons in its brief why this finding should be disturbed.

The district court's finding that "The net of [Mr. Sixt's] opinion was that those standards required Royal to refuse to deal with Mr. Mazzochi" is well supported by the record (JA 508, 516, 524-25, 528, 561-63). Furthermore, Mr. Sixt stated unequivocally that his opinion would not be changed at all if defendant Royal had known more about Mr. Mazzochi, and that neither the nature of any reference that defendant Royal had received about Mr. Mazzochi nor the fact that Mr. Mazzochi had been approved by the New York State Banking Department in order to serve as an officer of Mutual would have made any difference in his view (JA 562-63).

g. Mr. Mazzochi's Other Accounts

One of several factors which the district court considered in reaching its conclusion was the fact that Mr. Mazzochi had opened business accounts with defendant Royal long before the first sale on August 4, 1966. The district court obviously gave far greater weight to the fact that the accounts existed than to the nature of the accounts themselves, as appears from its observation that "None of these accounts involved amounts of money of the magnitude which the Treasury Note transactions did" (JA 15).

The district court's finding that Mr. Mazzochi's accounts did not cause any problem for the bank is supported by the record (JA 1171-72, 1192). The so-called "red flag" on one of Mr. Mazzochi's accounts, consisting of a notation that the bank should not pay against uncollected funds, was mentioned during the testimony of Mr. Sixt who, on cross-examination, admitted that he could not really say what such a notation meant and that it did not necessarily cast an unfavorable light upon Mr. Mazzochi (JA 509-12).

Defendant Royal does not contend that Mr. Mazzochi maintained balances in any of his accounts which approached the size of the transactions in question. However, we note in passing that the $500 figure described at page 25 of plaintiff's brief as representing the approximate balances of Mr. Mazzochi's accounts is shown by the record (JA 868) to represent the opening deposit in one of Mr. Mazzochi's accounts in October 1965.

h. Hutton's Decision Not to Report the Loss

The district court's finding that some or all of the loss could have been avoided if Hutton had not made its business decision not to report the loss is fully supported by the undisputed chronology of events. Hutton discovered that Treasury Notes were missing from its vault in August 1966 (JA 393-94). Mr. Stolz and Mr. Walter began making inquiry of the F.B.I., the Secret Service and the Comptroller of the Currency on or about September 22, 1966, and their investigation did not conclude until on or about September 29, 1966 (*supra*, pp. 9-12). Hutton identified the missing certificate numbers no later than September 24, 1966 (JA 40-41). On September 29, 1966, the sum of $71,698.70 was credited to Mr. Mazzochi's account (JA 685). Mr. Mazzochi withdrew $10,000.00 from his account on September 30, 1966 and an additional $61,000.00 on October 3, 1966 (JA 685-86). Hutton did not report the loss to the authorities until November 2, 1966 (JA 412-19).

In conclusion, the findings of fact of the district court which plaintiff contends are "clearly erroneous" are, without exception, fully supported by the record.

POINT II

Defendant is not liable to plaintiff for conversion.

Section 8-318 of the Uniform Commercial Code

Section 8-318 of the Uniform Commercial Code provides as follows:

> "An agent or bailee who in good faith (including observance of reasonable commercial standards if he is

> in the business of buying, selling or otherwise dealing with securities) has received securities and sold, pledged or delivered them according to the instructions of his principal is not liable for conversion or for participation in breach of fiduciary duty although the principal had no right to dispose of them."

There is no question that Treasury Notes are "securities" within the meaning of Article 8 of the Uniform Commercial Code. U.C.C. §8-102; *Morris* v. *Kaiser*, 299 So.2d 252, 15 U.C.C. Rep. 403 (Ala.Sup.Ct. 1974); *Martinez* v. *Dempsey-Tegeler & Co., Inc.*, 37 C.A.3d 509, 112 Cal.Rptr. 414, 14 U.C.C. Rep. 486 (Cal.App. 1974). There is also no question that defendant Royal acted as agent for Frank Mazzochi, Jr. in all of its dealings in respect of the Treasury Notes here in issue, and that it received them from Mr. Mazzochi and sold them to defendant Merrill Lynch according to Mr. Mazzochi's instruction. Accordingly, defendant Royal is relieved of liability for conversion by the provisions of Section 8-318 provided (1) it acted in good faith, and (2) if it is held to be in the business of buying, selling or otherwise dealing with securities, it observed reasonable commercial standards.

Good Faith

Section 1-201(19) of the Uniform Commercial Code defines "good faith" as "honesty in fact in the conduct or transaction concerned." There is no contention in this action that defendant Royal was not totally honest in all of its dealings with Mr. Mazzochi regarding the sale of the Treasury Notes. Accordingly, there is no question that within the meaning of Section 8-318 of the Uniform Commercial Code, defendant Royal acted "in good faith" in re-

ceiving the Treasury Notes and delivering them to defendant Merrill Lynch according to the instructions of Mr. Mazzochi.

"In the Business of Buying, Selling or Otherwise Dealing with Securities"

An agent whose conduct would otherwise bring him within the protection of Section 8-318 has no obligation to observe "reasonable commercial standards" if he is not "in the business of buying, selling or otherwise dealing with securities," and such agent would be relieved of liability for conversion if he merely acted "in good faith." As will be set forth in detail below, we believe that defendant Royal did in fact observe reasonable commercial standards. However, we also believe that it did not have an obligation to do so under Section 8-318 and that it is protected by that statute by virtue of having acted "in good faith."

We have found no cases which explain the meaning of the words "in the business of . . . ." It is clear that the legislature did not intend to require the observance of reasonable commercial standards by every agent who might receive securities and sell them according to the instructions of its principal, and in all probability, the legislature had stockbrokers and security dealers primarily in mind when it drafted this provision. Nevertheless, we believe that under any reasonable construction of that language, defendant Royal was not "in the business of buying, selling or otherwise dealing with securities."

The record is perfectly clear that the sale of Treasury Notes by defendant Royal was not part of its business but rather was a service or accommodation which the bank per-

formed on occasion for its customers (JA 882-83). Mr. Kayner testified that such sales were "strictly a service for the customer" (JA 307) and that the bank would not have sold securities for a stranger who walked in off the street (JA 318-19). Mr. Santoro testified that he had been working in defendant Royal's loan department for about six months prior to August 1966 and that on no more than one or two occasions during that six month period did the bank sell Treasury Notes for its customers (JA 184). Both Mr. Kayner and Mr. Santoro, as well as the documents in evidence, confirmed, and the district Court found, that defendant Royal did not charge Mr. Mazzochi a commission or service charge in connection with the sales of the Treasury Notes (JA 14, 184, 309-10, 642-46). Even Mr. Sixt, the plaintiff's expert banker, gave similar testimony, stating that banks are not "compelled" to sell securities, that the public goes to brokerage houses if they want to buy or sell securities and that if banks do deal with securities for customers, "it is a favor" and "it is not a day-to-day thing at most branches" (JA 529).

Reasonable Commercial Standards

Even if defendant Royal had been in the business of buying, selling or otherwise dealing with securities and had therefore been required to comply with reasonable commercial standards, we believe that its conduct in respect of the sales of Treasury Notes for Mr. Mazzochi plainly satisfied that requirement. We believe that there are three separate and distinct grounds which support defendant Royal's position, namely, (1) that the law is well established that defendant Royal had no duty to investigate Mr. Mazzochi's right to dispose of the Treasury Notes; (2) that the investiga-

tions which defendant Royal made were sufficient to satisfy any such duty which it may be found to have had; and (3) that in any event, defendant Royal can be charged only with knowledge of facts which a reasonable inquiry would have disclosed and no investigation, however thorough, could have revealed that the Treasury Notes were claimed by Hutton to have been lost or stolen.

No Duty to Investigate

The "reasonable commercial standards" applicable to an agent under Section 8-318 cannot be construed as any more exacting or demanding than the standards which would apply to a bank which, having acted as a principal, claims the status of a bona fide purchaser of the Notes presented to it. In August 1966 Mr. Mazzochi had been known to defendant Royal for more than a year and a half. He had been introduced to the bank by prominent local citizens who were well known to the bank, and Mr. Mazzochi himself was considered by the bank to be a reputable, solid citizen. The Notes which Mr. Mazzochi presented for sale were regular on their face. In these circumstances, the law is well established that a bank (perhaps unlike a member of the New York Stock Exchange) has no duty to investigate into its customer's right to dispose of the securities presented to it unless it has actual or constructive knowledge of some irregularity. *Gutekunst* v. *Continental Insurance Company*, 486 F.2d 194 (2 Cir. 1973); *Fidelity and Casualty Company of New York* v. *Key Biscayne Bank*, 501 F.2d 1322, 1326 (5 Cir. 1974), rehearing denied, 504 F.2d 760 (5 Cir. 1974); *Manufacturers and Traders Trust Company* v. *Murphy*, 369 F.Supp. 11, 13 (W.D. Pa. 1974); *Martinez* v. *Dempsey-Tegeler & Co., Inc.*, 37 C.A.3d 509, 112 Cal.

Rptr. 414, 14 U.C.C. Rep. 486 (Cal. App. 1974); *Colin* v. *Central Penn National Bank*, 404 F.Supp. 638 (E.D. Pa. 1975).

In *Gutekunst* v. *Continental Insurance Company*, *supra*, the bank accepted bearer bonds as collateral security for a loan from a man who was introduced to the bank on that same day by an accountant known to the bank. The bank made no investigation of the man or of his authority to transfer the securities. It was later discovered that the bonds had been stolen, and the "true" owner brought action to try to establish his superior right to the bonds as against the bank. In holding that the bank was a bona fide purchaser of the bonds and that its right was superior to that of the man from whom they were stolen, this Court said, at 486 F.2d 195, that "the New York law is that only actual knowledge or disregard of suspicious circumstances may constitute evidence of bad faith." The Court held that the bank's failure to make any investigation, even though it knew nothing about either the man or the bonds, did not impair its standing because "it is not ignorance, but guilty knowledge or conduct that can be equated with guilty knowledge, that can rise to bad faith." 486 F.2d at p. 196.

Plaintiff's assertion that the district court interpreted this Court's opinion in *Gutekunst* to mean that a bank need never investigate the customer with whom it is dealing or the circumstances of the transaction is simply not accurate and stems from plaintiff's unwillingness to accept that the district court found, as a matter of fact, that defendant Royal did not have "guilty knowledge" when it sold the Treasury Notes for Mr. Mazzochi. The record is clear that as far as defendant Royal knew, there was nothing irregu-

lar or improper either about Mr. Mazzochi or about the Notes or about the transactions. At the very most, Mr. Mazzochi's transactions might have aroused the curiosity of someone at the bank, but mere curiosity or unusual circumstances do not rise to the level of guilty knowledge. *Overseas Credit Corporation* v. *Cal-Tech Systems, Inc.*, 20 A.D.2d 355, 358, 247 N.Y.S.2d 252, 255 (1st Dept. 1964), aff'd, 14 N.Y.2d 909, 252 N.Y.S.2d 316 (1964); *Chartered Bank* v. *American Trust Co.*, 48 Misc. 2d 314, 264 N.Y.S.2d 656, 659 (Sup. Ct., N.Y. Co., 1965).

To impose a duty upon a bank in these circumstances to investigate title to Treasury Notes would interfere with their long-established easy negotiability. Treasury Notes "circulate today as freely as money; title passes by delivery." *Gruntal* v. *National Surety Co.*, 254 N.Y. 468, 474 (1930). Bearer securities of this type "flow through the market with a liquidity approaching that of currency itself." *Wolak* v. *United States*, 366 F.Supp. 1106, 1114 (D. Conn. 1973). No indicia of the right of ownership or possession normally exist (JA 535-44, 547-50, 557-60, 575-78). Treasury Notes are issued by the Bureau of the Public Debt of the Treasury Department of the United States, and it is the policy of that Department that in order to maintain the immediate marketability of the Notes, neither the Department itself nor banks and security dealers are required to investigate title to them when they are presented in regular course (JA 1077-78).

Mr. Mazzochi's conduct in selling the Treasury Notes seemed to have been that of a person who was properly in possession of the Notes which he was selling. He came to a bank where he was well known, and he dealt openly and

in his own name. He did not try to borrow money and use the Treasury Notes as collateral, in order to stash "hot" securities in the bank's vault until they "cooled". His sales extended over a period of five weeks, and he left portions of the proceeds of the first sales on deposit in his account for almost three weeks. When defendant Royal placed the proceeds of the last sale in suspense, Mr. Mazzochi not only came into the bank each day to try to obtain the release of his money but he even retained a lawyer to assist him. After the money had been released from suspense and Mr. Mazzochi had withdrawn it all, he did not disappear, but rather he remained as President of Mutual and continued to do business with defendant Royal.

Defendant Royal's Investigations

Assuming, *arguendo*, that defendant Royal had a duty to investigate title to the Treasury Notes presented by Mr. Mazzochi, the investigations and inquiries which it made should be considered sufficient to satisfy such duty. Before each sale for Mr. Mazzochi, Mr. Santoro called the Federal Reserve Bank to inquire whether the Treasury Notes presented to defendant Royal had been reported missing or stolen, and on each occasion he received a negative response. In September 1966, after the fourth sale had been effected but while the proceeds of that sale were still in defendant Royal's possession, Mr. Walter called the F.B.I. and the Secret Service to make the same inquiry which Mr. Santoro had made of the Federal Reserve Bank, and Mr. Walter also received a negative response. At about the same time, Mr. Stolz, the bank's attorney, made similar inquiry of Mr. Nathan, counsel to the Deputy Comptroller of the Currency, who, after several days of checking, informed

Mr. Stolz that he had found no record or indication that the Notes presented by Mr. Mazzochi had been reported missing or stolen and that defendant Royal seemed to have no choice but to credit the proceeds of the sale to Mr. Mazzochi's account. Before releasing the proceeds to him, defendant Royal required Mr. Mazzochi to sign an affidavit certifying that he was the rightful owner of the Treasury Notes which defendant Royal had sold for him, and Mr. Mazzochi freely did so.

In light of the fact that these Treasury Notes were bearer securities which pass by delivery and which require no proof of ownership, there were no further inquiries that defendant Royal can reasonably be expected to have made, and defendant Royal should therefore be held to have satisfied any duty of inquiry which it may be found to have had.

No Reasonable Inquiry Could Have Disclosed Anything

Even if this Court finds that defendant Royal should have made more inquiry than it did, the bank can nevertheless be charged only with knowledge of facts which a reasonable inquiry would have disclosed. The law does not impose liability upon a party for failure to have performed an act which would have accomplished nothing and would have been fruitless. *Hempstead Bank* v. *Andy's Car Rental System, Inc.*, 35 A.D.2d 35, 312 N.Y.S.2d 317, 320 (2nd Dept. 1970). Mr. Justice Breitel, speaking for the Appellate Division in 1952, expressed the rule as follows: "In other words, the duty to inquire, breached, will create liability, if inquiry could have revealed what would have deterred the inquirer from doing what he did . . . ." *Kinstlinger* v. *Manufacturers Trust Co.*, 280 App. Div. 729, 117 N.Y.S.2d 147, 151 (1st Dept. 1952).

It is admitted by the plaintiff that the alleged loss of the Treasury Notes was not discovered by Hutton until September 1966 and was not reported by Hutton to the authorities until November 1966. Accordingly, in August 1966, when the first sales took place, there was no way in the world that defendant Royal could have discovered that there was anything wrong with Mr. Mazzochi's right of ownership or possession of the Notes, regardless of what investigation it might have conducted, because not even Hutton itself knew that they were missing; and in September 1966, when the last transaction took place, and while defendant Royal and its attorney were conducting a more thorough investigation than before, they could not have discovered anything because Hutton had elected not to report the loss to the authorities.

The four cases which plaintiff cites at page 32 of its brief arose out of fact situations which bear no relationship to the instant case. Each of those cases involved claims by the defendants of entitlement to the status of holder in due course. In each case, the defendant was a principal participant in the underlying transaction and not merely an agent seeking the protection of Section 8-318 of the Uniform Commercial Code. In reaching their decisions, the courts in those cases found close relationships and prior knowledge which, on the very face of things, made the transactions suspect, as well as actual bad faith, actual knowledge of defenses to instruments and accordingly willful and deliberate failures to inquire. In the instant case, there was none of the "self-induced ignorance" which the court found in *Slaughter* v. *Jefferson Federal Savings & Loan Association*, 361 F.Supp. 590, 599 (D.D.C. 1973), nor was there the "secrecy

and circuitousness'' upon which the court relied in *Otten* v. *Marasco*, 353 F.2d 563 (2 Cir. 1965). Not only were Mr. Mazzochi's sales of Treasury Notes completely open and above board, but there was a total absence of what the court in *Slaughter* described as ''many warnings of irregularity which even a limited inquiry would have readily disclosed.'' 361 F.Supp. at pp. 599-600.

We believe it is clear that no reasonable inquiry could have revealed anything to deter defendant Royal from selling the Treasury Notes for Mr. Mazzochi, and only a virtually irrational refusal by defendant Royal to deal with a well established and well regarded corporate customer could have prevented these apparently regular transactions from taking place. In these circumstances, defendant Royal is at most guilty of an innocent conversion of the type encompassed by the provisions of Section 8-318 of the Uniform Commercial Code, the purpose of which was described by the California Court of Appeals in *Martinez* v. *Dempsey-Tegeler & Co., Inc.*, 37 C.A.3d 509, 514, 112 Cal. Rptr. 414, 14 U.C.C. Rep. 486 (Cal. App. 1974), as follows:

> ''The official comments by the American Law Institute and the National Conference of Commissioners on Uniform State Laws state that the purpose of the statute is '[t]o negate the liability of agents, including brokers, and of bailees, for innocent conversion or participation in breach of fiduciary duty . . . .' and that the statute follows the decision in Gruntal v. U.S. Fidelity & Guaranty Co. (reported as Gruntal v. National Surety Co. (1930) 254 N.Y. 468 [173 N.E. 682, 73 A.L.R. 1337]). That case held that innocent brokers selling stolen negotiable bonds in bearer form '. . . were not liable for conversion, when, in behalf of an ap-

parently honest customer with whom they had had past dealings, and without any cause whatever for suspicion, they sold for his account' such bonds. (173 N.E. at p. 684)"

Estoppel, Failure to Mitigate Damages and Contributory Negligence

The district court properly relied upon the doctrine of equitable estoppel, which provides that where one of two innocent parties must suffer a loss, the party whose conduct has permitted the loss to occur must sustain it. *Bunge Corporation* v. *Manufacturers Hanover Trust Company*, 31 N.Y.2d 223, 228, 335 N.Y.S.2d 412, 415 (1972). That the doctrine has been recognized by the drafters of the Uniform Commercial Code can be seen in Section 8-405, which provides that where a security has been lost or stolen and the owner fails to notify the issuer within a reasonable time and the issuer registers a transfer of the security before receiving notification, the owner is precluded from asserting a claim against the issuer. *Exxon Corp.* v. *Raetzer*, 533 S.W.2d 842, 18 U.C.C. Rep. 1292 (Tex App. 1976).

As the district court found, there is virtually no doubt that if Hutton had reported its alleged loss promptly, the money held in suspense in September would have been recovered. Therefore, plaintiff, as Hutton's assignee, should be estopped from recovering at least that portion of the claimed loss. In addition, since there is a good possibility that the full amount of the claimed loss could have been recovered if Hutton had made its report promptly and the matter resolved at once, the district court was correct in holding that Hutton's dilatory conduct was inherently prej-

udicial and plaintiff is therefore estopped from recovering anything at all from defendants.

In addition, plaintiff should be barred from recovery herein because of Hutton's failure to have taken any steps to mitigate damages. The law is well established that a tort plaintiff has a duty to mitigate damages, or, stated differently, "that a tort defendant is not liable for consequences preventable by action that reason requires the plaintiff to take." *Ellerman Lines, Limited* v. *The President Harding*, 288 F.2d 288, 290 (2 Cir. 1961).

That reason required Hutton to make a prompt report of its alleged loss to the proper authorities is clear not only from the testimony of Mr. Rockafeller referred to above, but also from the testimony of Mr. Sixt, who testified that the head office of First National City Bank, for which he worked for so many years, having discovered that government bearer securities were missing, would report them to the Treasury Department as stolen (JA 579-82) and that a banker could reasonably assume that such a loss would be reported promptly by anyone who so discovered it (JA 593).

Finally, plaintiff should be barred from recovery herein because of Hutton's contributory negligence. Defendant Royal does not contend that the negligence of an owner in not adequately safeguarding his property is available as a defense in an action for conversion. However, defendant Royal contends that once a loss has occurred, there is a duty on the part of the owner of the lost property, especially when that property consists of negotiable bearer securities, to exercise reasonable care to protect the general

public from the risk of innocently taking the stolen securities from the thief. At the very least, the reasonable care required in such a situation is to report the loss to the proper authorities as promptly as possible. Hutton's failure to have done so thus constitutes negligence on its part which should bar the plaintiff's recovery herein. *Cf., Federal Insurance Company* v. *Groveland State Bank,* 37 N.Y.2d 252, 372 N.Y.S.2d 18 (1975); *Arrow Builders Supply Corp.* v. *Royal National Bank,* 21 N.Y.2d 428, 288 N.Y.S.2d 609 (1968).

POINT III

Defendant Merrill Lynch's cross-claim against defendant Royal.

Defendant Merrill Lynch has filed a Notice of Cross-Appeal from Judge Werker's order dismissing plaintiff's complaint, "insofar as the dismissal of the plaintiff's complaint serves to dismiss the cross-complaint of defendant [Merrill Lynch] against defendant [Royal] by operation of law."

The cross-claim asserted by defendant Merrill Lynch against defendant Royal appears to be based upon certain warranties claimed to have been made by defendant Royal to defendant Merrill Lynch by the delivery of the Treasury Notes. There is no claim by defendant Merrill Lynch that defendant Royal made any express warranties or representations to it regarding the Notes. Accordingly, the relationship between defendant Royal and defendant Merrill Lynch is governed by the provisions of Section 8-306(3) of the Uniform Commercial Code, which provides, in part, as follows:

> "Where a security is delivered by an intermediary known to be entrusted with delivery of the security on behalf of another . . . , the intermediary by such delivery warrants only his own good faith and authority . . . ."

There is no question that defendant Royal was known by defendant Merrill Lynch to have been acting as Mr. Mazzochi's intermediary in delivering the Treasury Notes (JA 638-41). There is also no question that defendant Royal was fully authorized by Mr. Mazzochi to deliver the Notes and that defendant Royal acted in good faith with respect to defendant Merrill Lynch.

Accordingly, defendant Royal did not breach its warranties to defendant Merrill Lynch and cannot be held liable to defendant Merrill Lynch if defendant Merrill Lynch should be found to be liable to the plaintiff.

Conclusion

The judgment of the district court should be affirmed.

Respectfully submitted,

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Service of 2 copies of the
within ____ is hereby
admitted this ____ day of
____ 19__

Signed ____

Attorney for Plaintiff Appellant

Service of 2 copies of the
within ____ is hereby
admitted this ____ day of
____ 19__

Signed ____

Attorney for Defendant-Appellee